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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 504

FARBENFABRIKEN BAYER AG, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Nos. 505, 838 Misc. and 839 Misc.

FARBENFABRIKEN BAYER AG, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Various Motions and Petitions to the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM OF FARBENFABRIKEN BAYER AG

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This case is one of the first two Government anti-trust cases in which service has been attempted under

Section 293. It is the *only* case in which the maneuver has been tried where a patent was not challenged. It is in every sense a test case for a new—and, we believe, unwarranted—expansion of a service of process provision to apply to numerous types of actions. The district court itself recognized the uncertainty of its holding by acknowledging the existence of "substantial ground for difference of opinion" on the question decided. The serious doubt as to the correctness of the district court's decision and the significance of the jurisdictional question are compelling enough reasons for review now.

There is, moreover, an earthy and practical problem here that the Government ignores. If the district court was wrong, then the entire forthcoming antitrust trial will go for naught, even should the Government prevail. If Bayer was not properly served, then any judgment against it must eventually be reversed and the action against it dismissed. Once Bayer is out of the case, Chemagro will be entitled to reversal as well, for the Government was able to drag Chemagro into the District of Columbia—a district with which it has no connection—only by using Section 5 of the Sherman Act. Thus, the time, money and energy of both defendants, of the Government, and most important, of the judicial system, will have been wholly wasted. The suit presumably will begin all over again against Chemagro in Kansas City where Chemagro may properly be served and tried and where the action should have been brought in the first place.

Chemagro is, in fact, the real defendant in this case. All of the contracts alleged to be illegal are contracts entered into by Chemagro; Bayer has no connection with them, and none is alleged. Indeed, all that is alleged with respect to Bayer is that it combined with Chemagro and participated in Chemagro's violation because it gave an exclusive license to Chemagro (which the Government does not challenge), and because it is Chemagro's parent (deriving revenues from and exercising voting control over Chemagro).* To compel Bayer to submit to discovery and undergo a trial without an initial determination of the power of the district court over Bayer (and to subject Chemagro thereby to a fruitless suit 1,500 miles from its Kansas City home) is manifestly unfair in the circumstances of this case.

Common sense, and the objective of "just, speedy and inexpensive determination of every action," Rule 1, Fed. R. Civ. P., dictate that the district court's decision be reviewed in advance of trial. The Government, however, takes the position that there is no way to review the decision of the district court—even if it is grossly wrong—except by an appeal to this Court after a trial and the entry of a final decree. But im-

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* In its Memorandum, the Government fails to state that the grant of a license and its parental relationship are the only ways in which Bayer is even alleged to have "combined" with Chemagro or "participated" in the violation. In fact, Bayer did not even have a controlling interest in Chemagro during practically all of the time period covered by the complaint. (R. 14 in No. 504)

mediate review of the question presented by this case is altogether proper under existing law:

1. This Court's power under 28 U.S.C. § 1651 to review the district court's order is undisputed. This case is singularly appropriate for such review. The question of the district court's jurisdiction under Section 293 is novel, and will obviously be a recurring one. The expansion of jurisdiction over non-resident patent holders is precisely the type of extraordinary situation warranting the use of an extraordinary writ.

2. Alternatively, review is available under 28 U.S.C § 1292(b), which created a mechanism for prompt determination of close and controlling issues where such determination would hasten the end of the litigation. Section 1292(b) seeks the same objective as the Expediting Act and should be construed as complementary to it. The language of the Section supports such a construction; the legislative history does not indicate that Congress intended to exclude Government antitrust cases from the general jurisdiction affirmatively conferred by that language; nor does any reported case so hold.

The Court should note probable jurisdiction or grant certiorari.

Respectfully submitted,

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